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No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY.

On Petition for a Writ of Certiorari
to the Supreme Court of California

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The petition for certiorari and the *amicus* briefs demonstrated that this Court should grant certiorari. Respondent's arguments that this Court is powerless to do so – either because there is no Article III case or controversy or because the case does not present a sufficient federal interest to justify review now under 28 U.S.C. 1257(a) – lack merit. Article III is satisfied because the California Supreme Court's decision definitively rejected petitioners' First Amendment defense to liability and accordingly presents an "actual or threatened" injury to petitioners. Section 1257(a) is satisfied because that decision immediately threatens federal interests – both by chilling valuable protected speech and by check-mating the decision of other sovereigns to leave that speech free from such regulation. Respondent's remaining arguments merely rehearse the flawed First Amendment analysis of the majority below.

I. Article III Is No Obstacle To Review In This Court.

Because the California Supreme Court's decision directly threatens petitioners with injury, this case is properly before this Court. See *ASARCO* v. *Kadish*, 490 U.S. 605 (1989). Like petitioner Kasky, the *ASARCO* plaintiffs lacked Article III standing because they had suffered no personal injury but had merely brought a citizen suit. This Court held, however, that the case was properly brought here. Because it was "*petitioners*, the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts," the Court held that there was no obstacle to review because "*petitioners* have standing to invoke the authority of a federal court and * * * this dispute now presents a justiciable case or controversy for resolution here." *Id.* at 618 (emphases added). *ASARCO* thus requires only that the petitioner establish Article III standing in this Court. Accord Robert L. Stern et al., SUPREME COURT PRACTICE § 18.1, at 814 (8th ed. 2002) ("[A] party who seeks entry into the federal court system for the first time must be able to satisfy the Article III standing requirements at that point.") (citing *ASARCO*).

Quoting its seminal decision in *Warth* v. *Seldin*, 422 U.S. 490, 500, 501 (1975), this Court in *ASARCO* held that standing existed because "[p]etitioners are faced with '*actual or threatened* injury' that is sufficiently 'distinct and palpable' to support their standing to invoke the authority of a federal court." 490 U.S. at 618 (emphasis added). See also *id.* at 619 ("they personally have suffered some *actual or threatened* injury" (citation omitted)). Kasky fails to offer any reason why this Court should now modify *ASARCO* and employ a heightened standing (or ripeness) requirement.[1]

Each factor that established standing in *ASARCO* is equally present in this case:

> Petitioners contend before us that the Arizona Supreme Court's decision rests on an erroneous interpretation of federal statutes. They claim that the declaratory judgment sought and secured by respondents, along with the relief that may flow from that ruling, is invalid under federal law. If we were to agree with petitioners, our reversal of the decision below would remove its disabling effects upon them.

Id. The injury in this case is more palpable than even in *ASARCO*, because petitioners not only face the prospect that an award will be entered against them in this case, but also presently labor under the "defined and specific legal obligation" (BIO 10) to conform their speech to the California Supreme Court's definitive construction of that state's statutes and its narrow reading of the First Amendment. Cf. *Blatz Brewing Co.* v. *Collins*, 88 Cal. App. 2d 438, 444-45 (Cal. 1948) (appellate court's rulings are "law of the case, and are not open to question on a subsequent appeal"). Indeed, even respondent concedes that, if the relief he seeks is granted, petitioners will suffer an

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[1] Petitioners' injury also satisfies the formulation Kasky quotes – "direct, specific, and concrete injury" (*ASARCO*, 490 U.S. at 623)) – which did not purport to announce a more rigorous test for standing. Indeed, that formulation did not state a test at all but rather set forth the *ASARCO* Court's "*rationale* for [its] decision on this jurisdictional point." *Id.* (emphasis added).

Article III injury. See BIO 10. The distinct and present threat that such relief will be granted on remand confers standing.

That petitioners face an "actual or imminent injury" sufficient to satisfy Article III is confirmed by the law governing declaratory judgment and injunction actions. Respondent recognizes, as he must, that an "adverse declaratory judgment [is] 'an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts.'" BIO 9 (quoting *ASARCO*, 490 U.S. at 617-18). Petitioners' demurrer in the superior court is functionally indistinguishable from a request for a declaratory judgment that California's Unfair Trade Practice and False Advertising statutes violate the First Amendment and an injunction against the enforcement of those statutes. It is settled that plaintiffs have Article III standing to bring such an action when, as in this case, they face the immediate prospect of the statute's enforcement. *E.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."); 12 MOORE'S FEDERAL PRACTICE (CIVIL) § 57.22[8][a][1]. Indeed, the fact that petitioners are required to litigate the constitutionality of the state statutes' restriction on their speech is itself a constitutionally sufficient injury. See Center for Indiv. Freedom *Amicus* Br. ("CIF Br.) 3-4, 7-8.[2]

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[2] Nor is Kasky correct that, in supposed contrast to *ASARCO*, "no judgment of any kind has been entered against Nike in state court." BIO 8. The California Supreme Court's decision did produce a "judgment" against Nike, just as the Arizona Supreme Court's decision in *ASARCO* produced a "judgment" against the private lessees. See Cal. Code Civ. P. § 912 (termination of appeal produces a "judgment of the reviewing court"). Kasky's statement that the petitioners in *ASARCO* "would lose their leases as a result of the summary judgment against them" by the Arizona Supreme Court (BIO 8) is likewise incorrect: the Arizona Supreme Court did *not* determine the validity of the petitioners' leases, but rather declared certain state statutes invalid under federal law and remanded for further proceedings regarding what "relief, *if any*, might be appropriate" with respect to the individual leases. *ASARCO*, 490 U.S. at 610 (emphasis added).

Article III is accordingly no obstacle to review in this Court.

II. This Case Falls Within This Court's Jurisdiction Under 28 U.S.C. 1257(a) And Offers An Ideal Vehicle To Resolve The Questions Presented.

1. Respondent acknowledges, as he must, that this Court has jurisdiction under the so-called "fourth *Cox* category" to review a state court ruling if (i) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (ii) "refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). See BIO 13. This is a textbook case for application of that basic jurisdictional rule.

Respondent's concession that a ruling by this Court in petitioner's favor would require dismissal of his complaint as pleaded (BIO 14) ends the first inquiry. A ruling by this Court in petitioner's favor would deem the state law causes of action pleaded by Kasky, and definitively construed by the California Supreme Court in this case, unconstitutional as applied. Kasky nonetheless argues that this Court's jurisdiction is defeated by the mere possibility that the complaint hypothetically could be amended to add allegations *not* required by state law but intended to satisfy the requirements of a later ruling by this Court. Accepting that view would gut the vital role of the fourth *Cox* category. *Cox* did not require that the petitioner's vindication

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Respondent also errs in contending (BIO 10) that *ASARCO* is distinguishable because petitioners in this case could seek certiorari from a later adverse judgment. The *ASARCO* petitioners were free to seek further review if they lost on remand. See, *e.g.*, Br. for U.S. as *Amicus Curiae*, *ASARCO* 12-13 ("If petitioner's leases are declared void on remand, the federal question they seek to resolve now would not be moot and no disability that does not now presently exist would bar them from seeking review." (citation omitted)). This Court mentioned the prospect of the *ASARCO* petitioners "commenc[ing] a new action in federal court" (490 U.S. at 623, *quoted in* BIO 10) only as a means of securing immediate federal court review if this Court had elected to "*dismiss* the case at this stage" (490 U.S. at 623 (emphasis added)).

negate every imaginable theory of liability, but only that the relief sought from this Court would dispose of "the relevant cause of action *rather than merely controlling the nature and character of*, or determining the admissibility of evidence in, *the state proceedings*." 420 U.S. at 482 (emphasis added). And Kasky conclusively admitted below that if petitioners' statements do not constitute "commercial speech," "then the ultimate issue is resolved in Nike's favor, *and the statements are immune from state regulation*." Resp. CA S. Ct. Br. 1 (emphasis added).[3]

Respondent does not dispute that it would "seriously erode federal policy" under the fourth *Cox* category to decline to review a state court ruling that presents a substantial risk of chilling First Amendment expression. See BIO 15-17. The petition already disproved the assertion of the majority below (which Kasky just repeats) that its decision will only "deter false or misleading commercial speech." *Id.* 17. The decision below makes it exceedingly dangerous for corporate speakers to utter any factual statements about their operations unless they can first be absolutely certain those statements will later be deemed entirely truthful and non-misleading.

Hence, this case comfortably fits the fourth *Cox* category, as reflected by the precedents cited in the petition and in the *amicus*

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[3] The superior court properly dismissed the complaint "WITHOUT LEAVE TO AMEND" (Pet. App. 80a) and Kasky did not challenge that aspect of the ruling in the California Supreme Court. Kasky also offers no coherent explanation of what such an amendment would say. He states that he might allege that petitioners acted with "some level of culpability" (BIO 15), but the complaint already makes that claim (see Pet. 4 (citing allegations of negligence)). Respondent has not amended his complaint to state a still higher degree of culpability (indeed, he has agreed to a stay of the case pending this Court's disposition); he conspicuously does not allege that he actually *would* amend the complaint in that (or any other) fashion; and he does not suggest even obliquely that he ethically *could* do so (given that he concededly knows nothing about the underlying facts). Indeed, there is every reason to believe no further amendment would be forthcoming, given that respondent had every reason to plead the strongest possible complaint that he could the last time around.

briefs. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 55 (1988). See Pet. 29 (citing *Fort Wayne Books*, *supra*; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974)); Exxon-Mobil *Amicus* Br. 5-7 (citing, as well, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992); *Keller* v. *State Bar*, 496 U.S. 1 (1990); *Philadelphia Newspapers* v. *Hepps*, 475 U.S. 767 (1986)). Compare *Foster* v. *Laredo Newspapers*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977) (one-sentence order denying certiorari in case in which state supreme court had *not* resolved federal issue of what category of libel governed case), *cited in* BIO 15. Indeed, the federal interests at stake are of even greater moment here than in those cases, in which the governmental regulation targeted a relatively narrow class of speakers and usually involved speech on a narrow set of issues. This case, by contrast, involves factual speech by *any* business on virtually *any* issue. See, *e.g.*, Media *Amicus* Br. 2-4. Furthermore, this case involves speech on matters of profound public interest and importance, heightening the sacrifice to "federal policy" (*Cox*, *supra*) of leaving the decision below unreviewed.

There is no merit to the invocation by the majority below, which Kasky simply repeats (BIO 16 (quoting Pet. App. 20a)), of the theory that commercial speech is less likely to be chilled than other speech – a theory applicable at most to speech that consists of "*advertising*" (*Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976) (emphasis added)), "the *sine qua non* of commercial profits" (*id.*) that can easily be verified by the seller in advance (*Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring)). To the contrary, numerous features of the liability scheme approved in this case make it far *more* likely that a wide swath of indisputably protected speech will be chilled. See, *e.g.*, Pet. 24 (liability is "strict" and applies whether or not speaker made best efforts to verify facts); *id.* 24-25 (potentially massive monetary awards can result); *id.* 25 (liability attaches to statements regarding any business practice); *id.* 25-26 (liability attaches to statements in any forum, including newspaper editorials or statements on the internet); *id.* 26 (liability attaches even to statements made to third parties that corporation cannot control, such as "reporters or reviewers"); *id.* 27 (statute gives private attorney general status to each of California's 34 million residents); *id.* 27-28 (scheme imposes substantial litigation costs even for non-meritorious claims). See generally CIF Br. 4-7. To none of these problems has Kasky offered a word of response.

2. Beyond even the First Amendment issues it raises, this case is of profound import because California law now supersedes the choice of every other state and the federal government to leave speech like petitioners' unregulated. See Pet. 23-24, 26. The adverse effects of the California court's ruling on the exercise of federal rights in "other States" undermines federal interests for purposes of the *Cox* analysis. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988). As the petition explained, and as *amicus* Civil Justice Association of California amplifies (at 15-20 & app.), no other jurisdiction in the country would recognize Kasky's claim. And it is undisputed that California's law extends to statements by businesses made *anywhere in the world*, given that materials on the internet and in any substantial publication are all regularly received in California.[4]

3. Finally, this case offers the Court an ideal vehicle to decide the questions presented. Kasky's argument that this Court needs to know "exactly what statements were made and in what context" (BIO 17) is baffling. The complaint and its attachments set out all the statements at issue and their context. See generally Pet. Lodging. Every member of the three courts below felt perfectly capable of determining whether petitioners' statements were "commercial speech" on the existing record, and no

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[4] Kasky is correct (BIO 27) that Nike has not withdrawn from publication a previously distributed Corporate Responsibility Report; that would be a pointless exercise. The relevant and indisputable point is that the decision below has caused Nike to reduce substantially its communications on the wide range of issues encompassed by the decision below – including particularly labor and environmental issues.

party has ever suggested that some further factual record needed to be compiled on the matter. Further, as the petition explained, because petitioners' argument is precisely that this case must be dismissed at the outset, it would make little sense to review the case in any *other* posture.

This Court accordingly has jurisdiction to decide this case on the merits.

III. The Decision Below Conflicts With This Court's Precedents.

The petition for certiorari demonstrated that the decision below conflicts with this Court's First Amendment precedents. Respondent principally regurgitates the analysis of the majority below, which is deeply flawed for the reasons described in the petition and the *amicus* briefs. Respondent's remaining arguments are meritless.

1. Not only does the decision below conflict with the three definitions of "commercial speech" that this Court has propounded, but Kasky does not dispute that this case presents an ideal opportunity to rationalize those competing formulations.

a. The "no more than propose a commercial transaction" formulation. Kasky asserts that "Nike's statements proposed commercial transactions by conveying to consumers that they should buy its athletic shoes because, for example, the shoes are made by factory workers whose working conditions comply with 'applicable local laws and regulations governing occupational health and safety.'" BIO 21. But none of those statements even *mentioned* Nike shoes. Nor does even Kasky claim that Nike's statements did "no more than" propose a commercial transaction. Indeed, the undeniable and decisive fact is that Nike did not propose a transaction *at all*. Nike simply described itself and the operations of its contract facilities.

b. The *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), formulation. It is obviously inaccurate to call the statements in this case – made, for example, in letters to the editor and newspaper interviews, none of which identified a *single* Nike product – "just as much advertising for Nike and its products" (BIO 22) as the pamphlets in *Bolger*, which were "conceded to be advertisements" (463 U.S. at 66) because they identified the company (Trojan) and its products (condoms), and because Trojan held a near-monopoly share of the market, so that the absence of detailed product information was immaterial (*id.* at 66 n.13). Indeed, respondent's argument highlights the practical reality that the decision below renders a corporate speaker's "economic motivation" sufficient to transmute *all* of its statements on factual matters into "commercial speech." Contra BIO 22. For the only additional factor Kasky and the majority below identify – that the speaker must intend to reach consumers – describes almost *every* statement a corporation makes and is thus no limitation at all.

c. The "expression related solely to the economic interests of the speaker and its audience" formulation. The fact that Kasky's complaint alleges "that Nike made the statements at issue for the purpose of selling shoes" (BIO 22) misses the point entirely: Kasky's own theory is that petitioners' statements led listeners to make a *moral* decision that Nike was a company worthy of their business. (The BIO's later statement that the complaint alleges that Nike spoke "for the *purely* commercial purpose of selling shoes" (BIO 23 (emphasis added)) is a misrepresentation: there is no such allegation in the complaint.) The precise allegations of Kasky's own complaint do not in any event dissipate the conflict with this Court's precedents created by the California Supreme Court's legal holding that speech is "commercial," and therefore receives substantially lessened First Amendment protection, whenever the speaker had a commercial motive in mind, regardless of the *effects* of the speech on listeners' non-economic decisionmaking.[5]

2. The decision below furthermore conflicts with *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), and *Thomas* v. *Collins*, 323 U.S. 516 (1945), which hold that statements on labor issues are protected speech regardless of the speakers' intent to influence purchasing decisions. It makes no more difference that Nike

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[5] This case is, in addition, an appropriate vehicle to resolve the circuit conflict over the test for identifying "commercial speech" that is described in the *amicus* brief of the Chamber of Commerce (at 5-8).

sought to influence consumers (BIO 23) than it did that the labor picketing in *Thornhill* was intended to influence "customers and prospective customers" (310 U.S. at 99) or that the labor leader in *Thomas* sought to solicit new members (323 U.S. at 533-34, 537). And the speech in those cases manifestly *did* receive full First Amendment protection; Kasky fails to recognize the basic point that even fully protected speech "can be regulated" (BIO 24) in appropriate circumstances.

3. This Court essentially disposed of Kasky's claim that a one-sided restriction on "false" commercial speech cannot give rise to prohibited viewpoint discrimination (BIO 24-25) in *R.A.V.* v. *St. Paul*, 505 U.S. 377, 383-84 (1992), which rejected the argument that there "are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." Although respondent suggests that Nike's accusers might be sued for "product disparagement or trade libel," he admits that such claims are subject to the substantially more rigorous "reckless disregard" standard. BIO 25. Further, the fact that "damages could be awarded for harm caused to the company" (*id.*) gets the point precisely backwards: in contrast to a *Kasky* claim, such a suit may not be brought by private attorneys general who allege no personal injury at all.

4. Finally, respondent cannot avoid the conflict with this Court's holdings that commercial speech is fully protected when "inextricably intertwined" with noncommercial speech. See Pet. 22-23. The fact that statements of opinion on matters of public importance cannot be credibly made without including statements of fact is a matter of common sense that cannot be defeated by alleging the contrary in a complaint. Contra BIO 26.

This case merits plenary consideration because few cases in the past quarter-century have presented so clear a conflict with this Court's First Amendment precedents or such a clear threat to the freedom of speech in America.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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